

Nebraska considered big winner in river dispute with Kansas — despite Supreme Court's backing of \$5.5M penalty

By David Hendee / World-Herald staff writer | Posted: Wednesday, February 25, 2015 9:40 am

Nebraska and Kansas each claimed victory after the U.S. Supreme Court upheld a recommendation Tuesday that Nebraska pay \$5.5 million in damages to Kansas in a long-running dispute over the Republican River.

But Nebraska water authorities — while acknowledging that the state will write a hefty check to Kansas — said Nebraska was the big winner because Kansas will receive only a fraction of the \$80 million it had originally sought.

Nebraska Gov. Pete Ricketts said the court made a reasonable decision.

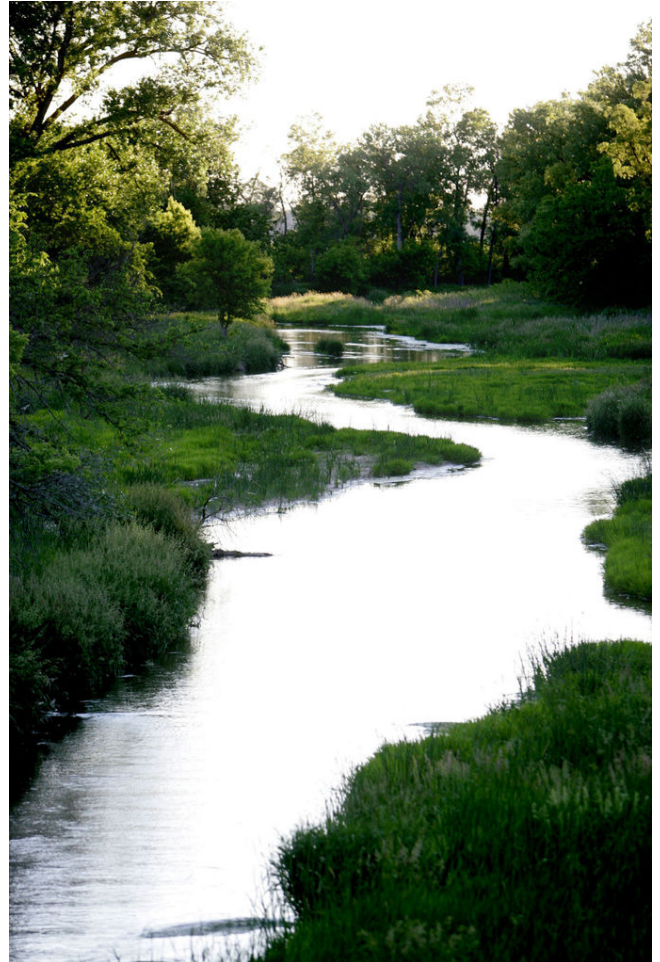
“Today is a good day for Nebraska,” he said.

Money to pay the \$5.5 million penalty is included in the governor’s budget bill now making its way through the Nebraska Legislature.

And despite the barbed legal rhetoric surrounding their court case, the two states have established a close working relationship in recent years that should keep water in the river and the neighboring states out of the courts.

“We’ve all learned there are better ways to do business than in a courtroom,” said Jasper Fanning of Imperial, manager of the Upper Republican Natural Resources District in southwest Nebraska.

The dispute centers on the Republican River Compact, an agreement signed by Nebraska, Kansas and Colorado in 1943 that allocates 49 percent of the river’s water to Nebraska, 40 percent to Kansas and 11 percent to Colorado.



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The Republican River at Franklin, Nebraska. The Republican originates in Colorado’s eastern plains, enters Kansas briefly and flows across a section of southern Nebraska before re-entering Kansas. It is not mountain-fed, but relies on tributary streams and underground water.

The river originates in Colorado and runs mostly through Nebraska before ending in Kansas.

Kansas has complained that Nebraska used more than its fair share of water from the river during the drought year of 2006.

After years of legal wrangling, the states ended up in front of a judge, appointed by the high court and known as a special master, in 2012. The special master found that Nebraska should pay Kansas \$1.8 million on top of actual damages of \$3.7 million for using more than its legal share of the river's water.

Even though Nebraska objected to the \$1.8 million in added damages, the Supreme Court concurred with the special master.

Jim Schneider, acting director of the Nebraska Department of Natural Resources, said the ruling was a win for Nebraska's farmers and ranchers.

Kansas Attorney General Derek Schmidt said the ruling was a victory for Kansas.

"Legally, this is a groundbreaking case that vindicates Kansas' rights as a downstream state," Schmidt said. "We brought this lawsuit to encourage our neighbors to live up to their obligations in future dry periods. I'm hopeful this strong and clear Supreme Court order will have that effect."

Don Blankenau of Lincoln, a water law attorney, said the decision was a win-win for the two states. Kansas won a monetary award, but Nebraska avoided crippling financial penalties, irrigation restrictions and federal control of the river.

Kansas initially sought \$80 million in penalties against Nebraska. It eventually asked for \$11.1 million before the court awarded \$5.5 million.

Kansas also asked the special master to halt irrigation on about 200,000 acres of Nebraska cropland in the basin, putting about \$500 million of property value at risk. The court declined.

And Kansas asked for a federal river czar to manage the river. The court declined.

"Anytime someone who gets less than 7 percent of what they started out asking for claims victory, they define 'victory' a little differently than I would," Blankenau said of Kansas' financial award.

The high court also corrected the way Nebraska's water account has been charged for seepage into the Republican basin from the Platte River basin.

Nebraska had been charged with consuming Republican River water that originated in Platte irrigation canals and from farmers watering cropland near the northern edge of the Republican basin.

The high court said it was wrong to define Platte water as Republican water.

The court noted that the miscalculation in 2006 alone cost Nebraska \$1 million of the total \$5.5

million penalty to Kansas.

The court decision on how to account for the Platte basin water was significant, said Dean Edson, executive director of the Nebraska Association of Resources Districts.

“The old accounting rules really cost us,” he said.

Fixing the Platte-Republican issue was the most important result of the case, said Suzanne Gage, a spokeswoman for Nebraska Attorney General Doug Peterson. The court’s agreement with Nebraska’s push to correct the error will ensure that Nebraskans receive their full water entitlement and are no longer improperly charged for using water to which Kansas is not entitled.

The ruling came four months after attorneys for Nebraska and Kansas argued their appeals of the special master’s recommendation before the high court. Kansas contended that Nebraska was a serial violator and hadn’t taken responsibility for its repeated failures to take appropriate action to avoid using too much river water.

Nebraska argued the state never knowingly violated the compact. It said strict pumping limits, imposed on the state’s irrigators in the basin in recent years, and new pipelines to pump underground water into the river as needed are more than adequate to protect the river flows that Kansas needs, even in dry years.

The suit included Colorado as a co-defendant. The Colorado Attorney General’s Office supported Nebraska, saying the state’s breach of the compact was neither intentional nor opportunistic.

Gage said she hopes the court ruling will move the three states forward and provide continued incentive to work together.

“We are confident that payment of the court’s recommended award will finally allow us to leave the past where it belongs — in the past.”

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